BILL LOCKYER
Attorney General of the State of California
LOUIS R. MAURO
Senior Assistant Attorney General
CHRISTOPHER E. KRUEGER
Supervising Deputy Attorney General
SUSAN K. LEACH
Deputy Attorney General
ZACKERY P. MORAZZINI, State Bar No. 204237
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 445-8226
Fax: (916) 324-5567
Email: Zackery.Morazzini@doj.ca.gov

Attorneys for Defendants Governor Arnold Schwarzenegger and Attorney General Bill Lockyer

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

VIDEO SOFTWARE DEALERS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California; BILL LOCKYER, in his official capacity as Attorney General of the State of California; et al.,

Defendants.

C 05 4188 RMW RS

GOVERNOR AND ATTORNEY GENERAL'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Hearing: May 12, 2006
Time: 9:00 a.m.
Courtroom: 6
The Honorable Ronald M. Whyte, District Judge

Defendants, Governor Arnold Schwarzenegger and Attorney General Bill Lockyer (collectively "the State"), respectfully submit the following in opposition to Plaintiffs' Motion for Summary Judgment ("Motion").

INTRODUCTION

Unsurprisingly, Plaintiffs' Motion attempts to cast the State in a spurious light, arguing that the State is simply seeking to control the thoughts of children. Plaintiffs essentially claim that there is no permissible means through which California can exercise its police power to limit purchases by children, without parental approval, of the most graphically violent and heinous video games. By definition, these games appeal to an abnormally unwholesome, grisly, gruesome interest in children that is well beyond the accepted norm of society. According to Plaintiffs, helping parents keep their children from playing these patently offensive video games is an "illegitimate" goal.

But who is harmed when the State acts to help parents prevent their children from playing these games without their knowledge? Certainly not the children. But ironically, it is the children's First Amendment rights that Plaintiffs purport to be protecting through this litigation.

Plaintiffs ask this Court to essentially ignore the volumes of social science supporting Assembly Bill 1179, California Civil Code section 1746 -1746.5 ("the Act"). Tellingly, Plaintiffs cite this Court to no peer-reviews publications or other established research that proves playing violent video games does not harm children. Instead, Plaintiffs simply argue that this Court should fall in line with a few non-binding decisions of other courts in other states that reviewed different statutes and different research. The State respectfully requests that this Court find the Act constitutional, after reviewing all of the evidence contained in the legislative record and according the Legislature the deference to which it is entitled, because the Act is supported by substantial evidence.

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ARGUMENT

I.

THE ACT SURVIVES STRICT SCRUTINY BECAUSE IT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. The Substantial Evidence Standard Does Not Demand Absolute Certainty, Especially When The State Acts To Protect Children.

The substantial evidence standard does not require the State to prove beyond a reasonable doubt that the video games covered by the Act can be harmful to the developing minds and personalities of children. Absolute certainty is not the standard and is not required. The substantial evidence standard leaves room for reasonable minds to differ. It is the job of the legislative and executive branches to consider the extensive evidence presented and make the final determination. And upon reviewing this final determination, the Supreme Court has made it clear that the substantial evidence standard "is not a license to reweigh the evidence *de novo*, or to replace [the legislature's] factual predictions with our own. Rather, it is to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994) (plurality opinion) (*Turner I*).

As the State argues through its own motion for summary judgment[1/], the Legislature "is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Ibid*. "Even in the realm of First Amendment questions where [the legislature] must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting [statewide] regulatory policy." *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 196 (1997) (*Turner II*).

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1. *See* State's Mot. Summ. J., § I. B. 2, on file herein.

The Supreme Court recognizes that absolute certainty on the part of a legislative body cannot always be achieved. Thus, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 391 (2000). Courts therefore "must accord substantial deference to the predictive judgments" of legislative bodies because "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner I*, 512 U.S. at 665-666.

In the context of regulations seeking to protect children, such as the Act, the Legislature's predictive judgments of harm and remedial measures are entitled to this Court's deference. This is especially true because, absent intrusive medical experimentation on children, 100% bullet-proof, concrete, definitive evidence may never be available to the State. But this is entirely permissible because the law recognizes that social science is not the same as hard science. Responsible social sciences such as child psychology and psychiatry must use field experiments, observation, cross-sectional correlation studies, longitudinal studies, and meta-analyses combining the results of other studies to form theories and conclusions regarding causation. Children can be observed and surveyed regarding the video games they play, observed interacting with other children and teachers, and their school performance can be reviewed. Correlations can then be discerned and professional opinions and conclusions formed regarding the impact that playing violent video games has on children. From those conclusions, social science can also draw conclusions regarding the impact that playing extremely violent video games, those covered by the Act, can have on children. Of course, not all children are the same and not all children will suffer the same deleterious effects of playing the games covered by the Act. And not all smokers will get lung cancer, while some who never have smoked will. This certainly does not mean that smoking is not harmful – it is widely accepted that first and second-hand smoke can lead to lung cancer despite the absence of direct causation. The absence of direct causation also certainly does not mean that a state has no compelling interest in protecting

its citizens from the harm.

Absent intrusive, unethical, and possibly illegal experimentation on children, social science may never be able to discover a single environmental variable that causes automatic aggression, increased aggressive behavior, antisocial behavior, desensitization to violence, and poor school performance in children. But such is not demanded by the First Amendment. All that is required is that the legislative body consider the available evidence, and draw reasonable inferences from the evidence considered. *Turner I*, *supra*, 512 U.S. at 666. Again, the Supreme Court recognizes that "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Ibid.* Once the legislative body does so, courts "must accord substantial deference to the predictive judgments" of the legislative body. *Ibid.*

B. It Was Not Unreasonable For The Legislature To Infer That The Video Games Covered By The Act Can Be Harmful To Children That Play Them.

Contrary to what Plaintiffs would have this Court believe, the Legislature carefully considered and weighed the evidence, both pro and con, before passing the Act. The Legislature considered the best available evidence in passing the Act, and nothing cited to the Court by Plaintiffs disproves the research the Legislature relied upon. The legislative record contains hundreds of pages of peer-reviewed articles, studies, reports, and correspondence from leading social scientists and medical associations analyzing the impact of media violence, and specifically violent video games, on minors and young adults. Articles by Dr. Craig A. Anderson, Ph.D.[2/], along with *many other* respected psychologists, psychiatrists, sociologists, and scholars explain the methodologies used and results obtained in researching the impact of video game violence on children. The legislative record contains no less than twenty-three published articles authored by respected social scientists explaining the negative impacts playing

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2. Dr. Anderson is a Distinguished Professor and Chair of the Iowa State University Department of Psychology. See http://www.psychology.iastate.edu/faculty/caa/. He has been publishing articles on the effects of violent video games on minors since 2000.

violent video games has on children.[3] The research shows that problems with automatic aggressiveness, increased aggressive thoughts and behavior, antisocial behavior, desensitization, poor school performance, and reduced activity in the frontal lobes of the brain can occur when children play violent video games.

Tellingly, Plaintiffs cite this Court to no peer-reviewed publications that disprove the Legislature's conclusion that playing violent video games causes harm to children. In fact, Plaintiffs' expert, Professor Dimitri Williams, previously testified that "most experts would agree that we have established covariation" showing that with people who play more violent video games, some tend to exhibit greater aggression. Pls.' Ex. B to Fallow Dec., 130:4-14 (Nov. 14, 2005 trial transcripts from *E.S.A. v. Blagojevich*, Williams' direct). Professor Williams even admitted that his position is "not that these games do not lead to [increased aggression], only that [he has not] professionally been convinced of that yet." *Id*., 175:2-25. Notably, Professor Williams testified that he is familiar with the work of Dr. Craig Anderson and "absolutely" considers him to be "an expert" in his field. *Id*., 199:23-25; 200:1-3. Professor Williams himself admitted that Dr. Anderson's General Aggression Model is "the most cited theory in [the] literature" in the field. *Id*., 200:4-13.

As explained in the State's separate motion for summary judgement[4], in 2004 (nearly four years after Judge Posner's opinion in *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (2001)), Dr. Anderson reported that an "updated meta-analysis reveals that exposure to violent video games is significantly linked to increases in aggressive behaviour, aggressive cognition, aggressive affect, and cardiovascular arousal, and to decreases in helping behaviour."[5] Dr. Anderson explained that "[e]xperimental studies reveal this linkage to be causal.

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3. *See* State's Request for Judicial Notice ("RJN") filed with the State's Motion for Summary Judgment; Appendix A, p. A014, "Violent Video Game Bibliography." Appendices A - E are presently on file with the Court through manual lodging and were previously served on all parties.

4. *See* State's Mot. Summ. J., § I. B. 1.

5. Appendix C, p. C091, Anderson, *An Update on the Effects of Playing Violent Video Games*, Journal of Adolescence, 24 (2004) 113-122.

Correlational studies reveal a linkage to serious, real-world types of aggression. Methodologically weaker studies yielded smaller effect sizes than methodologically stronger studies, suggesting that previous meta-analytic studies of violent video games underestimate the true magnitude of observed deleterious effects on behaviour, cognition, and affect." Appendix C, p. C091.

The Legislature was presented with strong evidence demonstrating the causal relationship between violent video games and the harm caused to children. One such article, a comprehensive meta-study, or statistical practice of combining the results of a number of studies that address a set of related research hypotheses, concluded that "[t]hough the number of studies investigating the impact of violent video games is small relative to the number of television and film studies, there are sufficient studies with sufficient consistency (as shown by the meta-analysis results) to draw some conclusions . . . . The experimental studies demonstrate that in the short term, violent video games cause increases in aggressive thoughts, affect, and behaviour; increases in physiological arousal; and decreases in helpful behaviour."[6/]

In another study where 607 eighth and ninth grade students from four schools were analyzed, research demonstrated that "[a]dolescents who expose themselves to greater amounts of video game violence were more hostile, reported getting into arguments with teachers more frequently, were more likely to be involved in physical fights, and performed more poorly in school."[7/]

The legislative record contains further research showing that playing violent video games increases automatic aggressiveness, even in adults. In a study conducted using 121 college students, the results showed "[w]hile most video game enthusiasts insist that the games they play have no effect on them, their exposure to scenes of virtual violence may influence them

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6. Appendix A, p. A100, Anderson, et al., *The Influence of Media Violence on Youth*, Psychological Science in the Public Interest, Vol. 4, No. 3, pp. 91-93 (December 2003).

7. Appendix B, p. B028, provided in full in Appendix D, p. D001, Gentile, et al., *The Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance*, Journal of Adolescence 27 (2004) 5-22, p. 5.

automatically and unintentionally."[8/] The study concluded that "[d]espite the misleading debate in the news media over whether exposure to violent television, movies and video games leads to an increase in aggressive behavior, the empirical evidence that it does so has become overwhelming." Appendix D, pp. D027-28.

The legislative record also contains research demonstrating that violent video games can lead to desensitization to violence in minors.[9/] Desensitization is "the attenuation or elimination of cognitive, emotional, and ultimately, behavioral responses to a stimulus [violence]." Appendix E, p. E03. The article reported specific findings that, as between violent video games, movies, televisions, and Internet content, "[r]egression analyses indicated that only exposure to video game violence was associated with (lower) empathy." Appendix E, p. E001 (internal citations omitted). Empathy is "the capacity to perceive and to experience the state of another [and] is critical to the process of moral evaluation." Appendix E, p. E004. Evidence in the legislative record plainly demonstrates a "[r]elationship[] between lower empathy and social maladjustment and aggression in youth . . . ." *Ibid*.

Other research in the legislative record demonstrates the impact violent video games have on brain activity. One such study, conducted over a two-year period by Dr. Kronenberger and reported by the Indiana University School of Medicine, concluded that "[t]here appears to be a difference in the way the brain responds depending upon the amount of past violent media exposure through video games, movies and television."[10/] For minors previously diagnosed with disruptive behavior disorders (DBD), the research demonstrated "less brain activity in the frontal

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8. Appendix B, p. B064, provided in full at Appendix D, p. D019, Uhlmann & Swanson, *Exposure to Violent Video Games Increases Automatic Aggressiveness*, Journal of Adolescence, 27 (2004) 41-52, p. 48.

9. Request for Judicial Notice, Ex. 2, Senate Rules Committee analysis of AB 1179, pp. 4-5; "Violent Video Game Bibliography," Appendix A, A014; Appendix E, p. E001, Funk, et al., *Violence Exposure in Real-Life, Video Games, Television, Movies, and the Internet: Is There Desensitization?*, Journal of Adolescence 27 (2004) 23-39.

10. Appendix A, p. A127, *Aggressive Youths, Violent Video Games Trigger Unusual Brain Activity*, Indiana University School of Medicine, December 2, 2002.

lobe while the youths with DBD watch violent video games." The frontal lobe "is the area of the brain responsible for decision-making and behavior control, as well as attention and a variety of other cognitive functions." Brain function was also altered in non-DBD youth. Appendix A, p. A127.

Plaintiffs argue that none of the research considered by the Legislature is persuasive but, again, cite this Court to nothing that disproves the research or conclusions. Indeed, Plaintiffs' witness, Dr. Howard C. Nusbaum, previously testified in Illinois that his professional opinion could be "summed up by saying that [he doesn't] believe that the [brain activity research] conclusions are supported by the research, but [he doesn't] have any contradictory research or findings that can unequivocally say that Dr. Kronenberger's results are wrong." Pls.' Ex. A to Fallow Dec., 409:1-7 (Nov. 15, 2005 trial transcripts from *E.S.A. v. Blagojevich*, Nusbaum cross).

The evidence regarding the negative impacts playing violent video games has on children is fully supported by the unanimous position taken by multiple professional medical associations. By correspondence dated April 15, 2005, the American Academy of Pediatrics informed the Legislature that "early studies on video games indicate that the effects of child-initiated virtual violence may be even more profound than those of passive media, such as televisions . . . . The time has passed for contemplating and discussing whether violence in video games and other media are harmful to our children. Action is needed." Appendix A, p. A085. The California Psychiatric Association informed the Legislature as follows:

> We believe that your legislation will provide a significant step towards decreasing child and adolescent aggression and violence. We believe it could also result in fewer child and adolescent behavioral, aggression and violence problems in homes, schools and communities. Were your bill to become law we would also expect to see a lessening of not only aggression, but symptoms of anxiety, depression, agitation and social isolation for many young people already predisposed to behavioral problems or with Severely Emotionally Disturbed diagnoses, or with Severe Persistent Mental Illness.

Appendix A, p. A082-084.

The United States District Court for the Western District of Washington reviewed similar research and came to the same conclusion as the California Legislature. In *Video Software*

Dealers Ass'n v. Maleng, the court expressly found that existing evidence and expert opinions supported the finding that "the depictions of violence with which we are constantly bombarded in movies, television, computer games, interactive videos games, etc., have some immediate and measurable effect on the level of aggression experienced by some viewers and that *the unique characteristics of video games, such as their interactive qualities, the first-person identification aspect, and the repetitive nature of the action, makes video games potentially more harmful to the psychological well-being of minors than other forms of media*." 325 F. Supp. 2d 1180, 1188 (W.D. Wash. 2004) (emphasis added).

In *Maleng*, the court struck down the video game ordinance not because existing research did not support the state's finding that violent video games cause harm to minors, but because the court found that "there has been no showing that exposure to video games that 'trivialize violence against law enforcement officers' is likely to lead to actual violence against such officers." *Ibid*. The act at issue in *Maleng* did not seek to prevent harm to minors, it sought to prevent minors from inflicting harm on law enforcement officers - an interest that is separate and distinct from that sought to be advanced by California. *Id*. at p. 1186. In the instant case, California is seeking to prevent harm to minors, not to prevent them from committing violent acts.

Other courts have considered older research and found it insufficient to support similar legislation. Judge Posner, for example, writing for the panel in *American Amusement Machine Ass'n v. Kendrick*, stated in dicta that "shield[ing] children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it." 244 F.3d at p. 577 (2001). Judge Posner's dicta has no application here for two reasons. First, the research relied upon in *Kendrick* was from 2000 and prior (when Dr. Anderson first began publishing on the effects of violent video games) – California has the benefit of over five years of additional research and publication on the subject. And second, the Act does not "shield" children from anything. The State is simply assisting parents in making the determination as to whether their children should be allowed to play the video games covered by the Act. The Act does not prohibit children from

playing the covered video games. Rather, it simply takes that decision out of the hands of children and store clerks, and places it in the hands of parents where it should properly rest. Interestingly, Judge Posner fails to explain how helping parents prevent their children from playing games that are so violent that they appeal to a child's deviant or morbid interest can under any circumstances be "deforming" or "leave them unequipped to cope with the world." Such dicta has no application to this case.

Automatic aggressiveness, increased aggressive thoughts and behavior, antisocial behavior, desensitization, poor school performance, reduced activity in the frontal lobes of the brain – each represents a distinct harm to the developing minds of children. And prevailing social science points directly to violent video games as a major culprit. Presented with such substantial evidence, the Legislature could not simply ignore the deleterious effects these video games are having on children. The Legislature's finding that the video games covered by the Act cause harm to children is supported by substantial evidence, and nothing cited by Plaintiffs comes close to disproving the finding.

Nevertheless, if this Court considers it necessary for the State to more fully elaborate on the present state of the research regarding the harmful effects violent video games have on children prior to deciding the issues raised in the parties' motions for summary judgment, the State respectfully requests that the Court grant summary adjudication in favor of the State, as requested in its separate motion, on the narrow tailoring, vagueness, labeling, and Equal Protection issues raised therein, and deny summary judgment to all parties. The parties can then proceed to trial on the remaining issues.

C. The Act Is Narrowly Tailored.

1. The Act Applies Only to Video Games Given Their Unique Interactive Nature.

As explained in the State's separate motion[11/], video games are unique in their interactive nature. The player controls the characters in first-person, causing them to shoot, stab, beat,

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11. *See* State's Mot. Summ. J., § I. C. 1.

stomp, run over, or ignite the opponent. Often this is the entire point of the game. The American Academy of Pediatrics advised the Legislature that "early studies on video games indicate that the effects of child-initiated virtual violence may even be more profound than those of passive media, such as television." Appendix A, p. A085. The California Psychiatric Association mirrored these concerns when it advised the Legislature that violent content in "interactive media" have "more significantly severe negative impacts than those wrought by television, movies, or music." Appendix A, p. A082. The California Psychological Association informed the Legislature that the research "point[s] overwhelmingly to a causal connection between media violence and aggressive behavior in some children" and that "[t]he interactive nature of video games exacerbates this problem." Appendix A, p. A081. And according to the American Psychological Association, "violent video games may be more harmful than violent television and movies because they are interactive, very engrossing and require the player to identify with the aggressor . . . ."[12/]

Plaintiffs likely would not dispute that video games, given their interactive nature, can be excellent mechanisms for teaching children a variety of subject matters. The Legislature considered the research that supports this conclusion.[13/] But just as the interactive nature of video games makes them exemplary teachers, it is this interactive nature that also posses a special risk to minors when the games contain extreme violence. Plaintiffs have cited this Court to no peer-reviewed research that would undermine this conclusion.

Focusing the Act on such interactive video games is the only means through which the Legislature could attempt to remedy the exacerbated harm caused thereby. Although the Legislature was presented with evidence that extreme violence in other forms of media can also cause harm to minors, substantial evidence supports the determination that the interactive nature

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12. http://www.apa.org/releases/videogames.html.

13. Appendix B, p. B003, Gentile & Gentile, *Violent Video Games as Exemplary Teachers*, paper presented at Biennial Meeting of the Society for Research in Child Development, April 9, 2005 (concluding that playing violent video games leads to greater hostile attribution bias and increased aggressive behaviors -- "exemplary" teaching of aggression).

of video games poses a special risk. The Legislature was more than justified in focusing on this narrow medium of violent material.

2. The Category of Video Games Covered By The Act Is Exceedingly Narrow.

By definition, the Act covers only those games that, as a whole, a reasonable person would find appeal to a deviant or morbid interest of minors, are patently offensive by community standards as to what is suitable for minors, and lack serious literary, artistic, political, or scientific value for minors. Civil Code, § 1746(d)(1). The Act provides an alternative definition with precise terms that cover only the most "especially heinous" depictions of violence on a substantially human character. Only video games meeting either definition, an exceedingly narrow category of video games, are covered by the Act.

In contrast to the Act, the video game ordinance at issue in *Interactive Digital Software Association v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003), relied heavily upon by Plaintiffs, applied to all "graphically violent video games," and was not narrowly drawn. Because the Act at issue covers only an exceedingly narrow category of violent video games, more precisely defined than that considered by the Eighth Circuit, it is narrowly tailored to serve the State's compelling interest.

3. The Act Does Not Restrict Adult Access to Any Video Games, and Does Not Prohibit Children From Playing the Games, Only Purchasing Them Without Adult Supervision.

The Act poses none of the problems at issue in prior Supreme Court cases where Congress sought to regulate indecent speech as to minors, but also prohibited adult access to the covered material. See *United States v. Playboy Ent. Group*, 529 U.S. 803, 812-817 (2000) (regulation of "signal bleeding" of indecent programing invalid because it also prohibited adult access); *Sable Communications, supra*, 492 U.S. at 127 (ban on "dial-a-porn" to protect minors struck down for prohibiting adult access to protected speech). Here, the Act is specifically limited to children. Adult access to all video games remains unimpeded.

And should parents or guardians desire children to have access to such games, they can purchase the games for the child. By containing this safe harbor, the Act hits only the

specifically desired target – children whose parents do not want them exposed to the extremely violent video games. Alternative avenues for children's access to the covered games are written into the Act. Thus, any burden placed on children is minimal. They need only persuade their parent or guardian to purchase these games for them.

4. No Less Restrictive Means Exists For Ensuring, Through Threat of Civil Penalty, That Children Only Have Access to Extremely Violent Video Games With Parental Knowledge.

Plaintiffs argue that "the State has utterly ignored less speech-restrictive alternatives to furthering its purported goals . . . ." Pls.' Mot. Summ. J., 17:1-3. But Plaintiffs provide this Court with no evidence that any of their proposed alternatives would have the desired impact on children's access to games covered by the Act. The presence of industry self-regulation has limited relevance in this case. The self-imposed ratings described in detail by Plaintiffs simply do not carry the force of a state law, the violation of which subjects the offender to civil penalty. As explained in the State's separate motion[14/], the Legislature considered substantial evidence demonstrating that the effectiveness of the video game industry's self-regulation is simply unacceptable. The Senate Judiciary Committee analysis raised the issue, stating, "[t]he author acknowledges that the ESRB rating system is currently in place, but argues that its implementation has been unsatisfactory." RJN, Exhibit 1, p. 13. In fact, the Legislature considered that "[r]ecent studies show that the voluntary rating and enforcement system implemented by self-regulatory associations or entertainment producers have had limited success on decreasing youth access to Mature (M) rated video games." RJN, Exhibit 1, pp. 13-14.

The Legislature was also made aware that "[d]uring 2004, the National Institute on Media and the Family had children between the ages of seven and fourteen attempt to purchase M-rated games in thirty-five stores. Youth succeeded 34% of the time. While the overall purchase rate was 34%, boys as young as seven were able to buy M-rated games 50% of the time." RJN, Exhibit 1, pp. 13-14. The Legislature was also aware that "a nationwide undercover survey of stores completed by the Federal Trade Commission in 2003 corroborated these findings. In this

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14. *See* State's Mot. Summ. J., § I. C. 4.

study, 69% of unaccompanied 13 to 16-year-olds purchased M-rated games and only 24% of cashiers asked the youth's age." *Ibid*.

The ineffectiveness of the industry's attempts to self-regulate comes as no surprise. According to a Federal Trade Commission ("FTC") report to Congress, cited to the Legislature in the Senate Judiciary Committee analysis, the industry specifically markets M-rated (Mature) games to minors.[15/] The FTC report states, "[a]ccording to industry data, nearly 40% of M-rated games purchased in 2002 were for children under 17." Appendix E, p. E053. Although Plaintiffs claim they have implemented new enforcement provisions, the FTC report concluded that "[t]he industry is actively enforcing those standards and penalizing those companies found to be in noncompliance. Yet those standards permit, and, in fact, industry members continue to place, advertisements in television and print media with substantial youth audiences." Appendix E, p. E054.

The Legislature was not willing to simply maintain the status quo, hoping that purported industry efforts would eventually eliminate children's access to extremely violent video games. The Act is thus narrowly tailored to ensure that, through threat of civil penalty, only with parental

knowledge will children have access to the most extremely violent video games. No less restrictive means of achieving this goal exists.

D. The *Brandenburg* Standard Does Not Apply To The Act.

The purpose of the Act is to protect the well being of children. The Act states its purpose as "preventing violent, aggressive, and antisocial behavior, and in preventing psychological or neurological harm to minors who play violent video games." Stats. 2005, Ch. 638, § 1(c) (A.B. 1179). Plaintiffs argue that because the Act seeks in part to prevent children from behaving aggressively, the State must satisfy the *Brandenburg* standard. Pls.' Mot. Summ. J., 7:21-28; *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

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15. Appendix E, p. E020, FTC July 2004 Report, at pp. 20-28; Request for Judicial Notice, Exhibit 1, pp. 13-14.

Plaintiffs argue that causing children to become more aggressive is not harmful to the children themselves, only to those on the receiving end of the aggression. Plaintiffs' argument is facially absurd, and is simply an attempt to subject the Act to the *Brandenburg* standard. Plaintiffs' attempt fails, as they cite this Court to no evidence showing that aggression is not itself harmful to the developing minds and personalities of children.

As this Court previously recognized, the *Brandenburg* standard applies when a statute seeks to prohibit "advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *See* Order Granting Pls.' Mot. Prelim. Inj., 11:11-16; *Brandenburg*, 395 U.S. at 447. By contrast, the Act is intended to prevent harm to children, which is itself the increased aggression and associated problems, and is not aimed at preventing children from violating the law. Thus, the *Brandenburg* standard is inapplicable.

II.

THE ACT'S LABELING PROVISION IS CONSTITUTIONAL.

A. The Labeling Provision Regulates Purely Commercial Speech.

The State may constitutionally require commercial products to be labeled with specific warnings or information. Commercial speech is subject to lesser protection than other constitutionally guaranteed expression. *See, e.g., Central Hudson Gas & Electric v. Public Services Comm. of New York*, 447 U.S. 557, 562-63 (1980) ("commercial speech . . . [is] expression related solely to economic interests of the speaker and its audience"). Additionally, within the class of regulations affecting commercial speech, there are "material differences between [purely factual and uncontroversial] disclosure requirements and outright prohibitions on speech." *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 650 (1985). Regulations that compel "purely factual and uncontroversial" commercial speech are subject to more lenient review than regulations that restrict accurate commercial speech and will be sustained if they are "reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651; *see also 44 Liquourmart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (less exacting scrutiny is required where truthful, non-misleading commercial

speech is restricted). In *Zauderer*, the Supreme Court recognized that the "appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." 471 U.S. at 651 (emphasis in original). Similarly in this case, the Act does not prohibit speech. Rather, the Act requires that factual legal information be placed on the cover of regulated video games. This requirement is reasonable and has minimal impact on plaintiffs' First Amendment Rights.

The "18 " required by the Act conveys factual and accurate information to purchasers and sellers of video games. The "18 " lets consumers and store clerks know that only individuals over 18 may purchase the game. This is factual and useful information for the consumer, as well as the clerk selling the games. Plaintiffs argue that this information "would demand a *false* statement, if the other portions of the law are enjoined because the label would appear to describe a legal restriction on sales where no such restriction exists." *See* Plaintiffs' Summary Judgment Br. at 18-19. However, Plaintiffs fail to address the flip side of the argument; namely, when the other portions of the law are upheld as valid, the "18 " simply requires a true statement regarding a legal restriction on sales of video games. Moreover, the "18" label is the least intrusive and easiest method to alert consumers and store clerks as to what games cannot legally be sold to persons under 18. Alternative methods of informing the public, such as separate lists provided by distributors or information on the Internet, are more cumbersome, intrusive and provide for a greater chance of inaccuracy and deception. The labeling requirement in the Act is reasonably related to the State's interest in alerting purchasers and sellers to the law, and is the most efficient and effective method of doing so.

B. The Labeling Provision of the Act Does Not Need to Meet Strict Scrutiny.

The Act's labeling requirement does not compel speech and, therefore, strict scrutiny does not apply. *See* States' Mot. Summ. J., pp. 23-24. Contrary to Plaintiffs' argument, this is not a case where the "18 " would force "'speakers to alter their speech to conform with an agenda that they do not set.'" Pls.' Mot. Summ. J., 19:14-15 (internal citation omitted). The "18 " is not an agenda or an opinion, but rather a valid and accurate statement of the law that video games covered by the Act cannot be sold to anyone under 18. Furthermore, *Pacific Gas & Electric Co.*

and *Riley* are readily distinguishable and are not applicable to the facts of this case.

The Court in *Riley* and earlier cases clearly stated that speech seeking charitable solicitations "have not been dealt with as purely commercial speech." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 788 (1988). There is nothing in this statute remotely comparable to the statute in *Riley*. This Act regulates violent video games and has nothing to do with charitable solicitations. Similarly lacking in persuasive force, the facts of *Pacific Gas & Electric Co.*, do not help plaintiffs. In *Pacific Gas & Electric Co.*, the Court found that the California Public Utilities Commission may not require a privately owned utility company to include in its billing envelopes speech of a *private third party* organization with which the utility disagrees. *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 20 (1986). Here, the plaintiffs may not like complying with the Act, but the label gives factual information of the law – not a private third party message as in *Pacific Gas & Electric Co.*

Plaintiffs argue that the "18" label is not narrowly tailored to achieve the State's goals and argue that relying on the ESRB ratings would be less restrictive. Pls.' Mot. Summ. J., 19:17-21. But this circular argument fails to address the specific reason that the "18" is required -- the "18" corresponds with the statute, as written, not as the plaintiffs wish it to be. The "18" denotes to purchasers and sellers that no one under 18 is allowed to purchase the video game. Applying the ESRB labels would be deceiving because the ESRB ratings and labels do not correspond to the Act.

Moreover, plaintiffs' continued reliance on *Blagojevich* is unconvincing because *Blagojevich* is not controlling law and the statutes involved in the two cases are not the same. Specifically, the labeling provisions in the statute in the *Blagojevich* case required "video game retailers – even those who do not sell violent or sexually explicit games – to post large signs in multiple places" and video game retailers would be required to write, print and distribute brochures explaining the ESRB rating system for any customer who requests the brochure. *Entertainment Software Association v. Blagojevich* 404 F. Supp.2d 1051, 1082 n.12 (N.D. Ill. 2005). Here, the California law only requires that an "18" be placed on the package of a video game meeting the relevant definitions under the Act and there is no additional requirements of

signage or brochures. The California Act is more narrowly tailored than the law that was struck down in *Blagojevich* and requires no extra signs or drafting of brochures. The California Act only requires that factual information be placed on video games meeting the Act's definitions. Thus, plaintiffs' arguments that the labeling provision in this Act are unconstitutional are not persuasive. The labeling requirement is reasonably related to the State's interest in alerting consumers and retailers to legal information, thus preventing their possible deception, and survives judicial scrutiny.

III.

THE ACT'S PROVISIONS ARE NOT IMPERMISSIBLY VAGUE.

Plaintiffs' arguments that certain terms in the Act are impermissibly vague is not supported by fact or legal precedent. Plaintiffs argue that the term "image of a human being" is vague in the context of the video game medium, but this argument ignores the plain meaning of the words. Plaintiffs state that "video game characters that appear to be human beings may actually be zombies, aliens, gods or some other fanciful creature, and might transform from humans to other beings." *See* Pls.' Mot. Summ. J., pp. 20-23. The Act's terms are precisely defined and require only the application of common sense – if it is an "image of a human being" it falls within the Act's proscriptions. If the entity looks like a fanciful creature or an alien that is not an image of a human being, the Act would not apply to that game. Plaintiffs ignore the plain meaning of the words when making their argument.[16/]

Moreover, Plaintiffs completely ignore the fact that the video game industry already voluntarily reviews and rates the level of violence in video games for all platforms.[17/] Under this rating system, the ESRB makes distinctions between "Animated Blood" ("discolored and/or unrealistic depictions of blood") and "Blood" ("depictions of blood"). *See* Lowenstein Decl.,

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16. Plaintiffs' reliance on *Blagojevich* is not helpful as the statute in that case did not have the same terms and definitions as used is this Act. The two statutes regulate the same subject matter, but the provisions of the Acts are different. Most importantly, *Blagojevich* is not binding on this Court.

17. *See* Declaration of Douglas Lowenstein submitted in support of Plaintiffs' Motion for Preliminary Injunction, on file, at ¶4.

Exhibit A. Additionally, the ESRB is able to distinguish between "Cartoon Violence" ("violent actions involving cartoon-like situations and characters"); "Fantasy Violence" ("violent actions of a fantasy nature, involving human or non-human characters in situations easily distinguishable from real life") and "Intense Violence" ("Graphic and realistic-looking depictions of physical conflict. May involve extreme an/or realistic blood, gore, weapons, and depictions of human injury and death.") *Id.* The ESRB is able to distinguish between fanciful blood and gore, and graphic and realistic-looking depictions of physical conflict. The ESRB makes a distinction between realistic human injury and death, and violent actions of a fantasy nature easily distinguishable from real life. Thus, although Plaintiffs argue that the industry could not possibly make distinctions between an alien and an image of a human being, the industry is already reviewing and rating video games based on those very same distinctions.

Similarly, Plaintiffs' argument that "serious physical abuse" is too vague is not convincing. The ESRB's ratings already take into account levels of violence, as discussed in the State's Motion for Summary Judgment at pages 20-21. Moreover, this particular term has been deemed constitutional in another context. With some terms, including "serious physical abuse" and "torture," the Legislature used definitions that had already been deemed constitutional by Courts in other contexts. *See Walton v. Arizona*, 497 U.S. 639, 654-55 (1990) (overruled on other grounds) (holding that any vagueness in the statutory definition of "heinous, cruel, and depraved" is cured by the limitation that the statutory definition of the offense involve torture or serious physical abuse and upholding a death penalty statute that used these definitions); *United States v. Jones*, 132 F.3d 232, 249-50 (5th Cir. 1998) (finding that similar definitions for cruel, depraved, heinous, serious physical abuse and torture were not unconstitutionally vague and did not lead to an arbitrary imposition of the death penalty). In this Act, the definitions for "heinous," "cruel" and "depraved" include qualifications requiring the act include torture or serious physical abuse of the victim and therefore survive the vagueness challenge as the death penalty statute in *Walton* survived. Moreover, the definitions for "serious physical abuse" and "torture" are almost identical to definitions used in a death penalty statute that survived a vagueness challenge in at least one Appellate Court. *See United States v. Jones*, 132 F.3d at 250.

Plaintiffs' "fertile legal 'imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question,'" but this exercise does not render the Act unconstitutional. *Grayned v. City of Rockford*, 408 U.S. 104, 110-111 n.15 (1979). Mathematical precision is not required when a legislature drafts a statute and a certain amount of flexibility is permissible. *Id.* at 110-111. The definitions in the Act require common sense judgment and determinations that the video game industry is already making. Thus, notwithstanding Plaintiffs' hypotheticals, the terms used in the Act are precisely defined and rely on a common understanding and meaning to apply them. As a matter of law, the Act's definitions of "violent video game" is not impermissibly vague.

CONCLUSION

The State's efforts to help parents protect children from the harmful effects of violent video games is supported by substantial evidence and is narrowly tailored to serve a compelling state interest. The terms used by the Legislature are sufficiently clear to allow a reasonable person to understand what is required by the Act. And the Act's labeling requirement is a permissible regulation of commercial speech. Therefore, for all of the foregoing reasons, the State respectfully requests that Plaintiffs' Motion for Summary Judgment be denied in its entirety.

Dated: April 19, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

LOUIS R. MAURO
Senior Assistant Attorney General

CHRISTOPHER E. KRUEGER
Supervising Deputy Attorney General

SUSAN K. LEACH
Deputy Attorney General

/s/ Zackery P. Morazzini
ZACKERY P. MORAZZINI
Deputy Attorney General
Attorneys for Defendants Governor Arnold Schwarzenegger and Attorney General Bill Lockyer

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (continued)